No. 80-474

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE PROCTER & GAMBLE MANUFACTURING COMPANY,
Petitioner,

VS.

DENNIS FISHER,
Respondent.

On Petition for a Writ of Certiorari
For the United States Court of Appeals
For the Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

	Page
CASES:	
Alexander v. *Aero Lodge No. 735*, 565 F.2d 1364 (6th Cir. 1977), cert. denied, 436 U.S. 946	4
Falcon v. *General Telephone Company of S.W.*, 626 F.2d 369 (5th Cir. 1980)	4
Hazelwood School District v. *United States*, 433 U.S. 299	2
Johnson v. *Uncle Ben's, Inc.*, 24 FEP Cases 1 (5th Cir. 1980)	4
Movement for Opportunity & Equality v. *General Motors Corp.* 622 F.2d 1235 (7th Cir. 1980)	4
Teamsters v. *United States*, 431 U.S. 324	1
United Air Lines v. *Evans*, 431 U.S. 553	1
Wells v. *Hutchinson*, No. TY-75-69-CA (E.D. Tex., Aug. 25, 1980)	4
STATUTES:	
Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e–2(h)	5

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The essential fact in this case is that both courts below have failed to apply both the Act of Congress authorizing bona fide seniority systems, and this Court's decisions in *Teamsters* v. *United States,* 431 U.S. 324, and in *United Air Lines* v. *Evans,* 431 U.S. 553. The district court decided the case below before *Teamsters* and *Evans* were decided. The court of appeals acknowledged *Teamsters* and *Evans,* but then clearly failed to apply those decisions. This alone is sufficient to require the grant of the petition and the reversal of the judgment below.

In its Brief in Opposition, the respondent's main contention is that workforce statistics may be sufficient to constitute *prima facie* proof of discrimination. The petitioner recognized its burden to show that "the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination" pursuant to *Teamsters,* 431 U.S. at 360, or of hiring before the statute of limitations period under *Evans.* The error of the courts below was that they failed to consider the evidence that the plaintiff's data, "snapshot" statistics based on a single moment of time, were the result of pre-Act hiring, and time-barred promotion decisions under a bona fide seniority system. What the evidence really shows is that the practices of the petitioner constituted a substantial voluntary affirmative action program, which will be imperiled if the decision below stands.

The basic difficulty with the respondent's contention that the petitioner merely failed to carry its burden of explanation is that it has no relationship to the proceedings or holdings below.

1. The impact of the company's bona fide seniority system on the snapshot statistics used by the courts below was never properly considered by either court.

The district court erroneously found that the seniority system was not bona fide, and thus had no occasion to consider evidence which "factored out" the effect of bona fide seniority from the effect of other challenged practices. Although the company did submit evidence on this point the court made no findings or conclusions on the impact of the company's practices exclusive of seniority. Petition at 8-9, 20-21.[1]

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[1] It is therefore somewhat puzzling that respondents can assert that "Thus unlike the lower courts in *Hazelwood* v. *United States,* 433 U.S. 299, here the trial court did consider the explanations offered by Petitioner, but concluded that Plaintiff had established class-based racial discrimination by a preponderance of all the credible evidence." Br. in Opp. at 7.

Although the court of appeals found that the seniority system was bona fide, it nonetheless relied completely on the same snapshot statistics which the district court used.[2] In its ruling in favor of the respondent, the court of appeals found "active discrimination" based on the "disparate impact" of the Company's promotional policies on blacks. But the finding of "disparate impact" cannot stand, for it was based exclusively on the "snapshot" of workforce statistics on the date of trial (Petition at 10-11), a method which inevitably disregards the effect of the petitioner's bona fide seniority system, contrary to this Court's decision in *Teamsters.*

The court of appeals below simply ignored the fact that the statistics reflecting employment on a particular day were necessarily affected by the operation of a bona fide seniority system, where whites had as a group greater seniority than blacks. (Petition at 16-17.) The respondent does not contend that the court of appeals gave any consideration to the extent to which the crucial workforce figures may have reflected time-barred discrimination and bona fide seniority. (*See* Petition at 19-21.) The respondent does not and cannot cite any conclusion of the court of appeals supporting the respondent's apparent contention that the decision below was based on the petitioner's failure to factor out the effects of neutral elements such as the Company's seniority system. Br. in Opp. at 6. Contrary to the

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[2] The respondents point to specific incidents which they maintain corroborate the trial court's inference of discrimination. Br. in Opp. at 6-7. The court of appeals cited these alleged incidents only in relationship to the total assessment issue, referring to them in a footnote beginning "The court also considered . . ." (App. A at 31a, n.35.) The court of appeals went on to conclude that the "significant underrepresentation of blacks in supervisory level management positions" was "an adequate basis" to invalidate total assessment. App. A at 32a.

decisions in *General Motors,*[3] and *Aero Lodge,*[4] as well as *Teamsters,* the court of appeals merely ignored the impact of bona fide seniority, and gave conclusive effect to "snapshot" workforce statistics.

2. No adverse impact was shown for *any* specific challenged promotion practice, and respondent cites none. (See Petition at 16-17.) The respondent restricts himself to an argument that the petitioner's proof did not exclude every possible way in which adverse impact might have been shown. (Br. in Opp. at 6.) When the record is examined, it is clear that no linkage between the challenged practices and the workforce statistics used to discredit them was ever established. (Petition at 10-11, 16-17.)

3. The respondent contends that the decision below will have little impact either on Procter & Gamble or on Title VII because the holding was limited and the facts were unusual. The asserted "peculiarity" of the facts does not limit the impact of the decision below on the basic recurring issues of bona fide seniority, snapshot statistics, or the appropriate size and construction of a statistical showing. What makes the case peculiar is how the precedents have been stretched to accommodate it, and that makes the case more rather than less important. Moreover, the potential impact of the decision below is clearly shown by the fact that it has already been cited as authority in at least three cases decided in the last four months: *Johnson* v. *Uncle Ben's, Inc.*, 24 FEP Cases 1 (5th Cir. 1980); *Falcon* v. *General Telephone Co. of S.W.*, 626 F.2d 369, 380 (5th Cir. 1980); *Wells* v. *Hutchinson,* No. TY-75-69-CA (E.D. Tex., August 25, 1980).

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[3] *Movement for Opportunity & Equality* v. *General Motors Corp.* 622 F.2d 1235 (7th Cir. 1980) cited in Petition at 19-20, 21, 24.

[4] *Alexander* v. *Aero Lodge No. 735,* 565 F.2d 1364 (6th Cir. 1977), *cert denied,* 436 U.S. 946, cited in Petition at 21.

The respondent's contentions about the impact on the petitioner illustrate rather than dispel the practical uncertainty which the decision creates. Noting a "legacy" of past discrimination, and acknowledging recent company steps to better the condition of blacks at the Dallas plant, the respondent goes on to say that the trial court found that the Company's "voluntary actions had not been *completely effective* and enjoined the Company to take additional measures under court supervision." (Br. in Opp. at 2; emphasis added.) What this amounts to is a contention that the Company is required to be "completely effective" in compensating for the effects of its bona fide seniority system, and time-barred decisions, in order to avoid liability. Thus, if the decision below is permitted to stand, the operation of this court's decisions in *Teamsters* and in *Evans* is neatly eliminated.

In attempting to make specific what the Company (and presumably other companies) would be required to do in order to comply with the decision below, the respondent recommends "eliminating the absence of black supervisors at its Dallas plant and taking reasonable measures to counter the remaining unfortunate racist attitudes on the part of the management of the Dallas plant." (Br. in Opp. at 8.) Aside from the uncertain nature of what this advice would require in practice, and aside from its uncertain grounding in the opinion it purports to interpret (there is no citation), the respondent fails to indicate how or why a company is to remedy workforce statistics which are the result of bona fide seniority and time-barred actions.

CONCLUSION

This case is important because there are many companies who need to know (1) their legal responsibilities with respect to the composition of their workforce, (2) the degree of protection which a bona fide seniority system provides, and (3) the affirmative steps which may be taken to increase minority opportunity without increasing exposure to Title VII liability.

Likewise the courts which are called on to apply Title VII should be instructed as to how to assess the impact of bona fide seniority and how to evaluate statistical showings such as the one put forth below.[5]

For these reasons, and for reasons advanced in the petition, certiorari should be granted.

Respectfully submitted,

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[5] The respondent illustrates the problem of interpretation in footnote 1 on page 4 of the Brief in Opposition where the argument seems to be that any explanation for racially disparate results—presumably even including an explanation based on bona fide seniority—must be supported by a showing of business necessity. This result would, of course, be totally inconsistent with both Section 703(h) and with this Court's clear decision in *Teamsters*.